Supreme Court, U.S.
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No. 84-1866

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN DI GILIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause entitles a criminal defendant to a new trial upon allegations, nine years after conviction, that a government witness's testimony was inconsistent with other government evidence disclosed to the defendant at trial.

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OPINIONS BELOW

The decision of the court of appeals is reported at 755 F.2d 924 (Table). The order of the district court (Pet. App. 1a-2a) is unreported.

JURISDICTION

The judgment order of the court of appeals (Pet. App. 16a-18a) was entered on December 5, 1984. A petition for rehearing was denied on January 2, 1985 (Pet. App. 19a-20a). On March 5, 1985, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including April 2, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1975, following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one felony count of conversion of government

records, in violation of 18 U.S.C. 641, and one felony count of conspiracy to defraud the United States government, in violation of 18 U.S.C. 371. Petitioner was sentenced to nine years' imprisonment and a fine of $10,000 on the conversion count and to a concurrent term of five years' imprisonment on the conspiracy count (Pet. App. 7a). On appeal, the Third Circuit reduced the convictions to misdemeanor violations of the same statutes. 538 F.2d 972, 978-981 (1976), cert. denied, 429 U.S. 1038 (1977). In 1979, following extensive hearings on petitioner's competency to stand trial, the district court sentenced petitioner to nine months' imprisonment for the conversion offense and five years' probation for the conspiracy offense. The court also assessed a fine of $2,000. Pet. App. 7a.

In 1984, five years after his resentencing, petitioner claimed discovery of new evidence demonstrating false testimony by a government witness. He asked the district court to vacate the convictions and order a new trial.[1] The district court conducted an evidentiary hearing and subsequently denied the request (Pet. App. 1a-2a, 3a-5a). The court of appeals affirmed without opinion (*id.* at 16a-18a).

1. Petitioner's convictions were based on his purchase of stolen government documents describing an FBI investigation of his suspected criminal activities. Petitioner used intermediaries to purchase the documents from George Kuczynski. Kuczynski obtained the documents from Irene Klimansky, a clerk-typist at the FBI, who photocopied them from originals in FBI files. 538 F.2d at 976.

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[1]Although petitioner described the action as a motion for a new trial, it was not based upon Fed. R. Crim. P. 33—indeed, if it were a Rule 33 motion, it would have been time barred. Petitioner had filed a new trial motion, and appealed the denial of that motion, in 1980, and he subsequently filed two other new trial motions in July 1982 and August 1983. His present motion is actually a collateral attack on his conviction seeking coram nobis relief.

Kuczynski testified at trial that he and petitioner discussed the purchases during a meeting at the Italian-American Civil Rights League (the League) (DA 13).[2] Defense counsel later examined FBI Agent Wayne Comer to determine whether the FBI had observed that meeting. Defense counsel asked Comer whether the League was under FBI surveillance and Comer responded that he did not know (SA 25-26; DA 14-15). The defense then asked him to check FBI surveillance files to determine whether "DiGilio was being watched" (SA 26; DA 15). Following Comer's examination of the FBI files, the government prosecutor offered to stipulate that there was no surveillance of the League by the FBI at any time, that there was surveillance of petitioner in December 1971, and that there was no sighting of petitioner with Kuczynski during the period of surveillance (DA 19-22). Petitioner rejected the stipulation. Those facts were then elicited through further examination of Comer (SA 37-43; DA 23-28). At the close of the trial, the jury found petitioner guilty.

2. On January 19, 1984, petitioner moved to vacate his conviction on the ground that previously undisclosed evidence exonerated him. Specifically, petitioner claimed that a recently obtained FBI report, in the prosecution's possession at the time of trial, indicated that the League had been under FBI surveillance at the time of the meeting between petitioner and Kuczynski. According to petitioner, this report indicated that Agent Comer had committed perjury and also proved petitioner's innocence.

The district court, concerned by the allegations of government misconduct, scheduled an evidentiary hearing to determine whether the government had withheld evidence from petitioner (Pet. App. 6a-15a). The court, relying

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[2] "DA" refers to petitioner's court of appeals appendix. "SA" refers to the government's supplemental court of appeals appendix.

on *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973), stated that "if the [evidence] was available to [petitioner,] there would be ample grounds to deny [petitioner's] motion for a * * * new trial" (Pet. App. 13a-14a).

At the hearing, testimony revealed that the "newly discovered evidence" was actually part of a government trial exhibit marked "G-16" (DA 175). The exhibit, known as the "DiDomenico Report" was one of the confidential FBI documents that the government alleged petitioner had purchased (DA 181-184, 189-191). The report, though not admitted into evidence, was used at trial (see SA 11-13). Testimony at the hearing indicated that petitioner and the defense attorneys had reviewed the report. Indeed, petitioner's fingerprints (DA 187-188) and the notations of a co-defendant's attorney (DA 184) were found on copies of the report that had been supplied to the defense and returned to the government in the course of the trial (DA 191-192). Additionally, testimony at the hearing established that the relevant portions of the report described surveillance, not by the FBI, but by other investigators (DA 175).

At the conclusion of the hearing, the district court stated that "the evidence is overwhelming that [the DiDomenico Report] was made available to the defendants" (DA 193); it subsequently entered an order denying petitioner's motion for a new trial (Pet. App. 1a-2a). Upon motion for rehearing, the court stated further that "the evidence establishes conclusively that defendant John DiGilio, his attorney and the attorneys for the other defendants had available to them prior to and at the trial the document disclosing that non-FBI surveillance had been conducted" (Pet. App. 4a).[3]

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[3]The court added, "Should defendant or his attorneys file any further motions in this action which prove to be baseless, both the defendant and the attorneys will be required to show cause why attorneys fees and costs should not be assessed against both the defendant and the attorneys" (Pet. App. 5a).

Petitioner appealed, contending that the district court erred in ruling that he was not entitled to a new trial. He maintained that the Due Process Clause entitled him to relief, despite his access at trial to what he labeled "newly discovered evidence," because the evidence indicated that a government witness had testified falsely. The court of appeals affirmed the district court order and denied rehearing without opinion (Pet. App. 16a-20a).

ARGUMENT

Petitioner sought to reopen a nine-year-old conviction on due process grounds, alleging that the government withheld exculpatory evidence at trial. The district court, in response, held an evidentiary hearing that conclusively demonstrated that the government had, in fact, seasonably supplied petitioner with the alleged "newly discovered evidence." Apparently abandoning his contention that the evidence was unavailable to him, petitioner now asserts that the district court erred in refusing to give further consideration to his request, claiming that the evidence establishes perjury by a government witness. The record reveals, however, that petitioner's perjury contentions are patently meritless. In all events, the court of appeals' refusal to reopen the conviction is consistent with the decisions of this Court, does not create a conflict among the circuits, and does not warrant this Court's review.

1. Petitioner bases his request for review on the assertion that a government witness testified falsely at trial (Pet. i, 3, 4, 9, 28, 29-44). Petitioner cites excerpts from Agent Comer's trial testimony indicating, in sum, that the agent was unaware of FBI surveillance of the League (Pet. 10-13) and that he later discovered no record of surveillance upon checking FBI files (*id.* at 13-16). Petitioner then points to what he purported was "new evidence"—the DiDomenico Report, produced by the government at trial, indicating possible non-FBI surveillance of the League—and accuses the witness of perjury.

Petitioner's accusation is clearly meritless. The agent's testimony, read in context, addressed *FBI* surveillance of the League.[4] Additionally, there is no indication in the record that the agent, upon reviewing FBI files, actually did discover non-FBI surveillance of the League and withheld that finding from the court. At bottom, petitioner's accusations rest on the lack of specificity in the questions asked. The government witness's answers were accurate responses to unfocused inquiries.[5] Petitioner's allegations of perjury, based on ambiguities of a sort present in any trial transcript, are completely unfounded. See, *e.g.*, *United States* v. *Anderson*, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); *United States* v. *Huckaby*, 400 F.2d 576 (6th Cir.), cert. denied, 393 U.S. 938 (1968).

2. Petitioner contends (Pet. 3) that Agent Comer's testimony concerning FBI surveillance was critical to his conviction. As we discuss later, that contention seems purely fanciful. But even if petitioner's exercise of hindsight leads him to believe that the DiDomenico Report could have been used to discredit Agent Comer, he is not entitled to a new trial. The report, on its face, has dubious impeachment value. But more importantly, petitioner had a full opportunity to use it for impeachment at trial. Petitioner does not challenge the district court's fully supported factual finding (Pet. App. 4a) that he had access to the report. Nor does he deny that he could have attempted to discredit the witness

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[4]Indeed, the questions cited by petitioner in the text of the petition themselves indicate that the agent was asked to testify about FBI surveillance. See Pet. 10 (citation omitted) (" 'was the [League] under any FBI investigation?' "); *id.* at 12 (citation omitted) (" 'I want to know about the observations by the FBI of John DiGilio and/or the [League].' ").

[5]Petitioner's assertion (Pet 3 (emphasis omitted)) that "[i]t is conceded by the district court and the government that the false testimony materially impacted upon the jury's verdict and indeed controlled it" is false. Neither the court nor the government ever made such a concession.

or secure clarification or amplification of the testimony by more precise questioning. Instead, petitioner seemingly believes that the government, rather than the defense, was obligated to assume the responsibility for clarification or impeachment.

Petitioner misapprehends the respective roles of the prosecution and the defense in a criminal trial. While the prosecution has an undoubted responsibility to prevent government witnesses from offering false testimony or deceiving the court, it is the defense's responsibility to pursue what it perceives as inconsistencies in government evidence. Despite petitioner's insistent and misleading characterizations to the contrary, the instant case does not involve false testimony. There was, at most, a *possible* inconsistency between Agent Comer's testimony and a government exhibit. This ambiguity could have been readily resolved by further questioning from the defense. In accordance with the adversarial responsibilities inherent in a criminal trial, see, *e.g., United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 7, the defense was obligated to probe further if it truly believed the doubtful proposition that a meaningful discrepancy existed. As Justice Marshall observed, "it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence." *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 14 (dissenting).

Petitioner simply ignores the well-established rule that defense counsel must either present possible impeachment evidence at trial or waive its use. Indeed, the rule applies even to evidence of false tesimony. As the Seventh Circuit has stated:

> "When a criminal defendant, during his trial, has reason to believe that perjured testimony was employed by the prosecution, he must impeach the testimony at

> trial and 'cannot have it both ways. He cannot withhold the evidence, gambling on acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding under 28 U.S.C. § 2255.' "

Ross v. *Heyne*, 638 F.2d 979, 986 (1980) (quoting *Evans* v. *United States*, 408 F.2d 369, 370 (7th Cir. 1969), which in turn quotes *Green* v. *United States*, 256 F.2d 483, 484 (1st Cir.), cert. denied, 358 U.S. 854 (1958)). See also, *e.g.*, *United States* v. *Iverson*, 648 F.2d 737, 739 (D.C. Cir. 1981); *United States* v. *Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980); *United States ex rel. Regina* v. *LaVallee*, 504 F.2d 580, 583 (2d Cir. 1974), cert. denied, 420 U.S. 947 (1975); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973); *Saville* v. *United States*, 451 F.2d 649, 651 (1st Cir. 1971). Certainly that principle should apply in the instant case, where petitioner can show no more than an ambiguity or possible incompleteness in a government witness's testimony. Indeed, its application is compelled by the "cause and prejudice" standard governing collateral attacks on convictions. See, *e.g.*, *United States* v. *Frady*, 456 U.S. 152 (1982).[6]

Petitioner attempts to avoid his trial obligations by citing various cases describing the government's duty to disclose evidence favorable to the defense (Pet. 32-35). We do not

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[6]Notably, petitioner places heavy reliance on the district court opinion in *Ross* v. *Heyne*, 483 F. Supp. 798 (N.D. Ind.), aff'd and rev'd in part, 638 F.2d 979 (7th Cir. 1980), to shift the duty of impeachment from the defense to the prosecution (Pet. 38-42). However, the court of appeals expressly refused to adopt the district court's "proposed absolute duty on the prosecutor" to correct, on his own initiative, false testimony. 638 F.2d at 985. The court of appeals permitted the defendant to challenge the use of false testimony in the habeas proceeding, but only because defense counsel's conflict of interest in the representation of a co-defendant prevented him from using the impeachment evidence at trial. *Id.* at 986. Once again, that case, unlike the present case, involved actual false testimony.

dispute the government's duty to disclose material exculpatory evidence. *E.g., United States* v. *Bagley*, No. 84-48 (July 2, 1985); *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972); *Brady* v. *Maryland*, 373 U.S. 83 (1963). But that principle is inapposite in the present case. The government did, in fact, provide the allegedly conflicting evidence to the defense (Pet. App. 4a). The present case does not "involve[] the discovery, after trial, of information known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103. See also, *e.g., Giglio*, 405 U.S. at 154 (emphasis added) ("whether the *nondisclosure* was a result of negligence or design, it is the responsibility of the prosecutor"). Petitioner, whether through intention or neglect, chose not to use the DiDomenico Report at trial. He cannot revisit that choice in collateral proceedings nine years after conviction.

3. Finally, even if it be assumed that the FBI agent's testimony was inconsistent with the DiDomenico Report and that the government, rather than petitioner, was obligated to point out the inconsistency, it is clear that the inconsistency would not have influenced the outcome of the trial. At most, the DiDomenico Report might indicate that non-FBI investigators, in maintaining surveillance of the League, did not observe a meeting between petitioner and George Kuczynski. Contrary to petitioner's assertions (Pet. 9), an investigator's failure to observe the meeting would not establish that the meeting did not take place. Indeed, the government was willing to stipulate at trial that, while it maintained surveillance of petitioner, it did not observe the meeting. Thus, the alleged inconsistency could not have prejudiced petitioner. See, *e.g., United States* v. *Frady*, 456 U.S. at 169-170. The court of appeals correctly ruled that petitioner, who has completed his sentence and is no longer on probation, is not entitled to collateral relief. Further review by this Court is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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